

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALPHONSO ROBINSON and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 00-869; Submitted on the Record;
Issued April 16, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a).

On July 27, 1989 appellant, then a 41-year-old mail carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on July 27, 1989 while he was on his mail route he was involved in an automobile accident and sustained injuries to his lower back. The Office accepted the claim for multiple contusions, lumbar subluxation at L3 and cervical subluxation at C6.

On September 26, 1989 appellant filed a Form CA-2a, notice of recurrence of disability. He indicated a recurrence of back pain on September 18, 1989 causally related to the employment injury of July 27, 1989. Appellant stopped work on September 20, 1989 and did not return. Appropriate compensation was paid to him.

In a letter dated June 27, 1990, appellant was referred for vocational rehabilitation. He participated in vocational rehabilitation for the period June 7, 1990 to March 13, 1992.

In a work restriction evaluation submitted January 9, 1991, Dr. John F. Shea, a Board-certified neurologist, indicated that appellant could return to his regular duties as a full-time mail carrier without restrictions. Supplemental medical records were submitted documenting appellant's continued disability.

On May 6, 1994 the Office referred appellant for a fitness-for-duty examination to Dr. Walter L. O'Hayre, Board-certified in occupational medicine. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated June 8, 1994, Dr. O'Hayre indicated that he reviewed the medical records provided to him and performed a physical examination of appellant. He noted

that appellant sustained an injury to his neck and back while in an automobile accident in 1989. Dr. O'Hayre determined that there was no objective evidence of abnormality or disability related to an automobile accident in 1989. He indicated that appellant was able to perform all the functions of his position as a letter carrier without restriction.

On October 11, 1994 the Office referred appellant for a second opinion to Dr. Robert R. Maxwell, a Board-certified orthopedic surgeon. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated November 17, 1994, Dr. Maxwell indicated that he reviewed the medical records provided to him and performed a physical examination of appellant. He noted appellant's history of an automobile accident in 1989 where appellant sustained an injury to his neck and back. Dr. Maxwell indicated that appellant could return to employment as a mail carrier without restrictions if the pending results of the magnetic resonance imaging (MRI) scan were within normal limits.

In a January 1997 letter, the Office requested a current medical report from appellant regarding the status of his employment-related condition. In a form report dated January 16, 1997, Dr. Robert I. Sandifur, a Board-certified internist, indicated a diagnosis of post-traumatic stress disorder, L4-5 lumbar disc syndrome and organic brain syndrome. He noted a November 1, 1996 computerized axial tomography (CAT) scan which revealed an L4-5 bulging disc which he determined to be work related. Dr. Sandifur indicated that appellant was under a lifting restriction of 20 pounds and indicated that appellant's poor intellectual function would preclude him from working except in sheltered situations.

On February 3, 1998 the Office referred appellant to an impartial medical examiner, Dr. Joseph Gimbel, a Board-certified orthopedic surgeon. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a medical report dated February 26, 1998, Dr. Gimbel indicated that he reviewed the medical records provided to him and performed a physical examination of appellant. He indicated that he examined x-rays, an MRI scan and a CT scan, all done in the period of 1989 to 1990. Dr. Gimbel diagnosed appellant with mental impairment and declining intellectual abilities; organic brain syndrome; and low back strain. He noted his examination revealed no positive objective findings just appellant's subjective complaints. Dr. Gimbel indicated that appellant did not suffer from any residuals from his injury of July 27, 1989. However, he indicated that appellant could not be gainfully employed based on his organic brain syndrome which is a nonindustrial and preexisting disability unrelated to the injury of July 27, 1989.

On May 11, 1998 the Office issued a notice of proposed termination of compensation on the grounds that the weight of the medical evidence established that appellant no longer suffered from any residuals of the July 27, 1989 employment injury. The Office provided 30 days in which appellant could respond to this notice.

Appellant submitted various medical records including a medical report dated March 24, 1998 from Dr. Ellison F. Herro, a specialist in anesthesiology and pain medicine. He documented appellant's July 1989 automobile accident. Dr. Herro noted that CT scans revealed an L4-5 central disc protrusion which did abut the thecal sac but did not appreciably deform it. The study noted that at all levels the nerve roots exit freely. There was no evidence of spinal stenosis. The study revealed a large amount of fat in the spinal canal.

By decision dated July 9, 1998, the Office terminated appellant's benefits effective July 18, 1998 on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from his July 27, 1989 employment injury.

By letter dated August 17, 1998, appellant requested reconsideration of the July 9, 1998 decision of the Office. He submitted additional medical evidence including a mental health consult dated April 6, 1998, prepared by Dr. Deborah Gilman, a specialist in psychiatry; and a medical report dated August 7, 1998 from Dr. Sandifur. Dr. Gilman's progress notes indicated appellant's history of post-traumatic stress disorder as well as the automobile accident in July 1989. Dr. Sandifur's report noted that appellant underwent a CAT scan of the back on November 1, 1996 which revealed minimal disc bulge at L3-4, with a central protrusion at L4-5. He indicated that an MRI scan was performed on February 13, 1997 which revealed no disc protrusion or spinal stenosis. The MRI scan revealed a large amount of fat in the spinal canal which was determined to be normal. Dr. Sandifur diagnosed appellant with severe post-traumatic stress disorder, chronic low back pain and mild cognitive dysfunction. He determined appellant was not employable as a result of these conditions.

By merit decision dated September 22, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of its prior decision.

By letter dated September 21, 1999, appellant's attorney requested reconsideration of the September 22, 1998 decision of the Office. Appellant submitted additional medical evidence including a CAT scan of the lumbar spine dated November 1, 1996; an MRI scan of the lumbar spine dated February 13, 1997; a duplicate copy of Dr. Herro's report of March 24, 1998; and a duplicate copy of Dr. Sandifur's report dated August 7, 1998.

By decision dated November 9, 1999, the Office denied appellant's application for review without conducting a merit review on the grounds that the evidence submitted was irrelevant, immaterial and insufficient to warrant review of its prior decision.

The only decision before the Board on this appeal is the Office decision of November 9, 1999. Since more than one year elapsed from the date of issuance of the Office's September 22, 1998 merit decision to the date of the filing of appellant's appeal, December 21, 1999, the Board lacks jurisdiction to review this decision.¹

¹ See 20 C.F.R § 501.3(d).

The Board finds that the Office in its November 9, 1999 decision properly denied appellant's request for reconsideration on the merits under 5 U.S.C. § 8128(a) on the basis that his request for reconsideration did not meet the requirements set forth under section 8128.²

Under section 8128(a) of the Federal Employees' Compensation Act,³ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁴ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that OWCP erroneously applied or interpreted a specific point of law;
or
- (ii) Advances a relevant legal argument not previously considered by the Office;
or
- (iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁵

In the present case, the Office denied appellant's claim without conducting a merit review on the grounds that the evidence submitted was irrelevant, immaterial and insufficient. In support of his request for reconsideration, appellant submitted a November 1, 1996 CAT scan of the lumbar spine; a February 13, 1997 MRI scan of the lumbar spine; a duplicate copy of Dr. Herro's report of March 24, 1998; and a duplicate copy of Dr. Sandifur's report dated August 7, 1998. The CAT scan of the lumbar spine dated November 1, 1996 indicated minimal disc bulge centrally at L3-4. The study noted that the disc abuts the anterior margin of the thecal sac but did not seem to deform it appreciably. The study also revealed at L4-5 there was central protrusion. The February 13, 1997 MRI scan of the lumbar spine noted a large amount of fat in the spinal canal but otherwise was essentially normal. Appellant indicated in his appeal that these studies were not considered by Dr. Gimbel, the impartial medical examiner, in his evaluation of appellant on February 26, 1998 and, therefore, Dr. Gimbel's report was based on an incomplete history and was not entitled to probative value. He noted that the Office relied on Dr. Gimbel's opinion in the September 22, 1998 decision and was in error in doing so. Dr. Gimbel ultimately determined that appellant no longer suffered residuals of his July 27, 1989 work-related injury. However, he opined unequivocally that appellant had no objective residuals

² See 20 C.F.R. § 10.606(b)(2)(i-iii)

³ 5 U.S.C. § 8128(a).

⁴ 20 C.F.R. § 10.606(b) (1999).

⁵ 20 C.F.R. § 10.608(b).

of the employment-related injury, which proved consistent with the two previous second opinion report's from Dr. O'Hayre dated June 8, 1994 and Dr. Maxwell dated November 17, 1994.

Furthermore, the information submitted was cumulative of information already in the record and considered by the Office. Specifically, Dr. Herro's report dated March 24, 1998, describes the findings of the MRI and CAT scans. This report was considered by the Office in its decision dated July 9, 1998. Additionally, Dr. Sandifur's report of August 7, 1998 describes the results of the CAT scan performed November 1, 1996 and the MRI scan performed February 13, 1997. This report was duly considered by the Office in its decision dated September 22, 1998. Appellant also submitted a copy of Dr. Herro's report of March 24, 1998 and Dr. Sandifur's report of August 7, 1998. However, these reports were repetitive of reports previously considered by the Office. Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did he submit relevant and pertinent evidence not previously considered by the Office."⁶

The decision of the Office of Workers' Compensation Programs dated November 9, 1999 is hereby affirmed.

Dated, Washington, DC
April 16, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

⁶ 20 C.F.R. § 10.138(b)(1).